APPENDIX

(G-38)

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-831

GRIFFIN, INC.,

Appellee,

— against —

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY, and JOHN WILLEY,

Appellants.

Appeal from the United States District Court
For the District of Vermont

Jurisdictional Statements filed on December 11, 1975.
Probable Jurisdiction noted February 23, 1976.

TABLE OF CONTENTS

COMPLAINT.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GRIFFIN, INC.,

Plaintiff,

v.

JAMES H. TULLY, JR., A. BRUCE MANLEY, MILTON KOERNER, FRANCIS X. MALONEY, and JOHN WILLEY,

Defendants.

Civil Action File No. 75-104

PARTIES

1. Plaintiff Griffin, Inc., is a corporation organized under the laws of the State of Vermont, with its only place of business on U.S. Route 7 in Arlington, Vermont. Plaintiff is a retailer of home furnishings, souveniers and gifts.

2. Defendants Tully, Manley and Koerner are Commissioners of the New York State Tax Commission. Defendant Maloney is the Director of the Sales Tax Bureau of the New York Department of Taxation and Finance. Defendant Willey is the Senior Sales Tax Examiner of the Sales Tax Bureau of the New York State Department of Taxation and Finance.

JURISDICTION

3. Jurisdiction is based upon Title 28 United States Code Section 1331 (federal question), in that the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs, and arises under the Constitution of the United States, as more particularly set forth below.

4. Jurisdiction is not barred by Title 28 United States Code Section 1341, because the plaintiff does not have a plain, speedy and efficient remedy in the State of New York.

VENUE

5. Venue is proper in this judicial district under Title 28 United States Code Section 1391(b), because the claim arose in this district.

BACKGROUND OF THE CASE

6. Plaintiff was incorporated in Vermont on or about March 25, 1946, under the name Kane-Griffin, Inc. The name of the corporation was changed to Griffin, Inc. on February 4, 1953. The corporation has carried on a retail furniture business in Arlington, Vermont since its formation, and has had a store at its present location on the western side of U.S. Route 7 in Arlington since approximately 1947.

7. A substantial portion of plaintiff's sales are made to persons who are not residents of Vermont, including residents of New York.

8. Articles purchased from plaintiff are sometimes carried away from the store by the purchasers, and, especially with respect to purchases of furniture, are sometimes delivered to the purchaser in trucks owned by Griffin, Inc.

9. For the calendar year 1974, total sales (net of refunds), by plaintiff amounted to $596,596.00, and total net income after taxes amounted to $17,530.00.

10. At the close of the calendar year 1974, the total assets of plaintiff amounted to $259,458.

11. Plaintiff has never been and is not now registered, qualified or authorized to do business in New York State.

12. Plaintiff has never owned any real property in New York State.

13. Plaintiff does not solicit sales in New York State through salesmen or other representatives.

14. Plaintiff has no office, warehouse, or other facility of any kind in New York State.

15. On or about February 21, 1973, George Bradford, an associate sales tax examiner of the New York State Sales Tax Bureau came to plaintiff's place of business for the purpose of conducting an audit of the records of plaintiff, and advised officers of plaintiff that the purpose of such audit was the establishment of sales records upon which to base an assessment of New York state and local sales and use taxes owed by plaintiff.

16. Plaintiff refused to permit Mr. Bradford to conduct an audit.

17. By letter dated April 16, 1975, the Sales Tax Bureau informed plaintiff that defendant Willey will come to plaintiff's place of business at 10:00 a.m. on Wednesday, April 23, 1975, for the purpose of conducting an audit of plaintiff's records in order to determine plaintiff's liability for New York State and local sales and use taxes.

18. Defendant Maloney, by letter dated March 20, 1975, advised plaintiff that defendant Maloney intends to issue assessments for New York State and local sales and use taxes, based upon audit or estimates, dating back to August 1, 1965.

19. Assessments of New York State and local sales and use taxes against plaintiff dating back to August 1, 1965, would amount to a sum in excess of $10,000.00.

20. The actions of defendant Willey in seeking to audit the records of plaintiff, and of defendant Maloney in seeking to assess New York State and local sales and use taxes against plaintiff, are being taken at the instance and on the instructions of defendants Tully, Koerner and Manley, who, as members of the Tax Commission of the State of New York are the employers and superiors of defendants Willey and Maloney.

21. In the event that defendants cause to be issued against plaintiff assessments for New York state and local sales and use taxes, plaintiff would be without a plain, speedy and efficient remedy in New York State because, inter alia, Section 1138 of the New York Sales and Use Tax law requires that, prior to contesting the amount or legality of any assessment, plaintiff pay the full amount of taxes assessed, plus interest or penalties, or file a bond in an amount sufficient to cover such taxes, interest and penalties. Because of the amounts involved in this case, plaintiff would thus be without any available remedy in New York State.

COUNT ONE

22. The assessment, levy or collection of New York State and local sales and use taxes against plaintiff would create an improper burden upon interstate commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

COUNT TWO

23. The assessment, levy or collection of New York State and local sales and use taxes against plaintiff, or any steps such as audits, inspections or seizure of property leading thereto, would deprive plaintiff of its property without due process of law, in violation of

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

COUNT THREE

24. The assessment, levy or collection of New York State and local sales and use taxes against plaintiff, or any steps leading thereto such as audits, inspections, or seizure of property, would deny to plaintiff the equal protection of the laws, inasmuch as the defendants have not and could not efficiently impose such burdens uniformly upon all border merchants similarly situated to plaintiff.

WHEREFORE, plaintiff demands:

1. That the Honorable Court issue a declaratory judgment to the effect that the assessment, levy or collection of New York state and local sales and use taxes upon or against plaintiff would violate the commerce, due process and equal protection clauses of the United States Constitution.

2. That the defendants be permanently enjoined from assessing, levying or collection, or taking any steps leading thereto, New York State and local sales and use taxes against or upon plaintiff.

Dated at Bennington, Vermont, April 22, 1975.

GRIFFIN, INC.

BY--WILLIAMS, WITTEN,
CARTER & WICKES
115 Elm Street
Bennington, Vermont 05201

by s/ R. Paul Wickes
R. Paul Wickes
A member of the firm

NOTICE OF CROSS MOTION TO DISMISS.

(SAME TITLE).

SIRS:

PLEASE TAKE NOTICE, that upon the complaint herein and defendants' memorandum of law submitted herewith, the undersigned will move this Court at a time, day and place to be set by this Court for an order dismissing the complaint herein against defendants pursuant to Federal Rules of Civil Procedure Rule 12(b) (1) and (3) for lack of jurisdiction over the subject matter and failure to state a claim upon which relief may be granted.

Dated: Albany, New York
May 8, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Office & P. O. Address
The Capitol
Albany, New York 12224

by:

THOMAS P. ZOLEZZI
Assistant Attorney General
Tel. (518)-474-1394

THERIAULT & JOSLIN, ESQS.
PETER JOSLIN, ESQ.
87 Main Street
Montpelier, Vermont 05602
Tel. (802)-223-2381
Resident Counsel for
Defendants

Motion for Preliminary Injunction.

TO: WILLIAMS, WITTEN, CARTER
& WICKES, ESQS.
115 Elm Street
Bennington, Vermont 05201

MOTION FOR PRELIMINARY INJUNCTION.

(SAME TITLE).

COMES NOW Griffin, Inc., plaintiff in the above-entitled action, and, by its undersigned attorneys, Williams, Witten, Carter & Wickes, moves that the Court issue a preliminary injunction, after notice to the Governor and Attorney General of the State of New York and hearing as required by 28 U.S.C. 2284, and, in support of its motion states the following:

1. Defendants first contacted plaintiff concerning plaintiff's asserted liability with respect to New York States Sales and Use Tax, on or about February 20, 1973. That first contact was followed shortly by a letter addressed to plaintiff's counsel from George Bradford, an agent of the defendants, a copy of which letter is attached hereto as Exhibit "A".

2. In a letter to plaintiff's counsel dated March 29, 1973, a copy of which is attached hereto as Exhibit "B", defendant Maloney's predecessor, Abram J. Cuttler, indicated the legal basis for the defendants' assertion that plaintiff is liable for New York sales tax.

3. On June 4, 1973, at the invitation of agents of the defendants, plaintiff's counsel submitted to the

defendants a memorandum of law outlining the legal basis for plaintiff's contention that it was not required to collect New York State sales tax.

4. On June 12, 1973, agents of the defendant acknowledged receipt of plaintiff's memorandum, by a letter addressed to plaintiff's counsel. A copy of that letter is attached hereto as Exhibit "C".

5. The next communication received by plaintiff or its counsel from the defendants was dated March 10. 1975. A copy of that letter, together with the enclosure, is attached hereto as Exhibit "D".

6. On May 14, 1975, defendants caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due", showing an amount due of $218,085.37. A copy of the Notice is attached hereto as Exhibit "E".

7. The Notice referred to in Paragraph 6 hereof is based on an estimate. Plaintiff believes that the actual amount of taxes which would be owing, if plaintiff is liable for these taxes, would be substantially less.

8. The issuance of the aforesaid Notice serves to commence collection procedures and appeal times, under the New York States Sales and Use Tax Law. Under New York law, unless the relief prayed for in this motion is granted, Plaintiff will lose whatever rights it may have to appeal this notice on or about August 11, 1975.

9. Unless the defendants, their agents, employees, and others acting with them, are enjoined from taking any further steps leading toward the collection of the taxes in dispute in this action, and unless the appeal period commenced by the issuance of the Notice is stayed, plaintiff will suffer irreparable injury, for which it will have no adequate remedy at law.

10. The issuance of a preliminary injunction will cause no hardship to the defendants.

WHEREFORE, plaintiff respectfully requests the Honorable Court, after notice and hearing as required by 28 U.S.C. 2284, to enjoin the defendants, their agents, employees, and others acting in concert with them, from taking any further steps leading to the collection of the sales taxes in dispute in this action, and plaintiff further requests that the court order the defendant tax commissioners to stay the 90 day appeal period commenced by the issuance of the Notice of Determination on May 14, 1975, pending resolution of this action.

Dated at Bennington, Vermont, May ___, 1975.

GRIFFIN, INC.

BY--WILLIAMS, WITTEN,
CARTER & WICKES

by _____
R. Paul Wickes
A member of the firm

Exhibit A – Letter, dated 2-22-73
attached to Motion for Preliminary Injunction.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
Albany District Office
State Campus
Albany, N.Y. 12227

State Tax Commission

Norman F. Gallman,
President
A. Bruce Manley
Milton Koerner

Francis X. Maloney
District Tax
Supervisor

February 22, 1973

Mr. John Williams
Attorney at Law
Elm Street
Bennington, Vermont

Dear Mr. Williams:

As you requested, I have enclosed a copy of the New York State Sales and Use Tax Law, as well as several registration cards.

In our telephone conversation of February 21, 1973, I stated the position of the New York State Sales Tax Bureau regarding the operation of your client, Griffin, Incorporated. We feel that they are doing business in New York State and, therefore, are required to collect the state and applicable local sales tax.

If you have any questions, please do not hesitate in contacting me.

Exhibit A – Letter, dated 2-22-73
attached to Motion for Preliminary Injunction.

I would appreciate being advised of your clients intentions regarding this matter.

Very truly yours,

s/ George Bradford

George Bradford
Senior Sales Tax Examiner

GB:pt
Enclosures

Exhibit B – Letter, dated 3-29-73
attached to Motion for Preliminary Injunction.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
State Campus
Albany, N. Y. 12227

Sales Tax Bureau

State Tax Commission

Abram J. Cuttler
Director

Norman F. Gallman,
President
A. Bruce Manley
Milton Koerner

March 29, 1973

William H. Williams, II, Esq.
Williams, Witten & Carter
115 Elm Street
Bennington, Vermont 05201

Re: Griffin's of Arlington, Inc.

Dear Mr. Williams:

I have your letter of March 12, 1973 addressed to Mr. Bradford of our Albany District Office. Mr. Bradford has consulted with me regarding Griffin's sales tax liability in the light of its activities in New York.

This Department's Counsel has held that the National Bellas Hess case is controlling and that any other New York activity constitutes sufficient nexus to require a vendor to charge, collect and remit the New York State and local sales or use tax. National Bellas Hess was limited to interstate solicitation by mail and interstate delivery by mail or common carrier. Griffin has some known New York activities beyond the limited scope of Bellas Hess, such as delivery in its own vehicles and local advertising. There may be other

Exhibit B — Letter, dated 3-29-73
attached to Motion for Preliminary Injunction.

activities of which we have no immediate knowledge -- repairs, set ups, etc.

I suggest that you voluntarily permit Mr. Bradford to examine Griffin's books and records, especially as they pertain to New York customers. I am sure you are aware of our right to make a direct assessment against the purchaser.

I would also suggest that you give serious consideration to registering on a voluntary basis. It has been the experience of several border states (especially since sales tax is nearly universal) that customer relations outweigh tax advantages when purchaser assessments become a factor.

Mr. Bradford will contact you in the near future.

Very truly yours,

s/ Abram J. Cuttler

Abram J. Cuttler
Director, Sales Tax Bureau

cc--Mr. Bradford

Exhibit C – Letter, dated 6-12-73
attached to Motion for Preliminary Injunction.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
State Campus
Albany, N. Y. 12227
Telephone 474-2121

RPW

State Tax Commission

Norman F. Gallman,
President
A. Bruce Manley
Milton Koerner

Sales Tax Bureau

Abram J. Cuttler
Director

June 12, 1973

John H. Williams, II, Esq.
Williams, Witten & Carter
115 Elm Street
Bennington, Vermont 05201

Re: Griffin's of Arlington

Dear Mr. Williams:

The memorandum submitted with your letter of June 5, 1973 is being forwarded to Saul Heckelman, Counsel, for his consideration.

When he has completed his review, he will reply directly to you.

Very truly yours,

s/ Kermit J. Smith

Kermit J. Smith
Sales Tax Audit Supervisor

cc--Mr. Bradford

Exhibit D(1) – Letter, dated 3-10-75.
attached to Motion for Preliminary Injunction.

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
State Campus
Albany, N. Y. 12227

State Tax Commission

Saul Heckelman,
Acting Commissioner
A. Bruce Manley
Milton Koerner

Sales Tax Bureau

Francis X. Maloney
Director

March 10, 1975

John H. Williams II, Esq.
Williams, Witten & Carter
115 Elm St.
Bennington, VT 05201

RE: Griffins of Arlington, Inc.

Dear Mr. Williams:

The information submitted with your letter of June 5, 1973, has been considered and it is the Department's position that their activities which consist of deliveries into New York State by their own vehicles, repairs in New York State by their employees and advertising on New York State radio stations and in New York State newspapers constitutes nexus in this state and requires registration with the Sales Tax Bureau.

I have enclosed a copy of the Tax Department's News Release No. 33, issued in July 1974, which confirms this position. The release refers to merchants located in New Jersey but applies to all merchants with similar situations.

Exhibit D(1) — Letter, dated 3-10-75
attached to Motion for Preliminary Injunction.

I will notify Mr. George Bradford of the field audit section to re-contact your client so an examination of his books and records may be made to establish the correct sales tax liability. Also, a registration form must be filed so that tax may be collected in the future.

Very truly yours,

s/ Francis X. Maloney

Francis X. Maloney
Director, Sales Tax Bureau

Enclosure

Exhibit D(2) – Tax Department News Release No. 33 attached to Motion for Preliminary Injunction.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE

State Campus Albany, N.Y. 12227

TAXATION AND FINANCE
Mario A. Procaccino, Commissioner

Walter J. Baker
Director of Public Relations
(518) 457-4242

For immediate use. . . Release No. 33

ALBANY, N.Y., July 8, 1974 -- Roadblocks set up to discover shipments of household furniture, appliances and other taxable merchandise trucked into New York by New Jersey merchants without collecting the New York sales tax have turned up several violators, State Tax Commissioner Mario A. Procaccino said today.

The roadblocks, conducted last month at three bridges leading from New Jersey to Staten Island by New York State tax agents and local police, were prompted, Commissioner Procaccino said, by complaints from Staten Island merchants that some New Jersey vendors were making deliveries to Staten Island customers without collecting the sales tax.

As a result, neither the New York nor the New Jersey sales tax was being collected on these purchases. A New Jersey vendor who makes deliveries into New York State by his own or leased vehicles is required to register with the New York State Sales Tax Bureau.

During the roadblocks last month, State sales tax auditors and local police checked more than 150 trucks entering Staten Island from New Jersey over the Goethals Bridge, the Outerbridge Crossing and the Bayonne Bridge.

Exhibit D(2) — Tax Department News Release No. 33 attached to Motion for Preliminary Injunction.

Most of the trucks were operated by manufacturers or vendors who are registered with the New York States Sales Tax Bureau, Commissioner Procaccino said. However, 14 trucks were not and these vendors are being contacted by the Sales Tax Bureau and advised of their liability to collect and remit the New York sales tax on purchases which they deliver into this State.

New York customers who made tax-free purchases in New Jersey are not exempt from the New York State and local sales tax. They are required to pay the tax directly to the State Sales Tax Bureau when an out-of-State vendor does not collect it. Purchasers who do not voluntarily report the tax may be contacted by the Sales Tax Bureau regarding their tax liability.

Commissioner Procaccino, who said the roadblock operation of Staten Island was "highly successful," promised similar surveys periodically to enforce compliance with the Tax Law.

Exhibit E(1) – Notice attached to Motion for Preliminary Injunction.

ST-570 (10/65)

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
SALES TAX BUREAU
STATE CAMPUS
Albany, New York 12226

NOTICE OF DETERMINATION AND DEMAND FOR PAYMENT OF SALES AND USE TAXES DUE

Notice Number
90,756,431
Date of Notice
May 14, 1975
Identification Number
Unregistered

Griffin, Inc.
U.S. Route 7
Arlington, Vermont

Make payment promptly at your State District Tax Office. TCB - Albany Z

Make remittance payable to New York State Sales Tax Bureau.

Please show notice number on face of check or money order.

Return one copy of this notice with your payment.

NOTE: This determination shall be final unless an application for a hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax.

The tax stated below is for the period August 1, 1965 to February 28, 1974

Explanation: (Brought forward from attachment)

Period Ended	Tax	Penalty & Interest to 5/20/75	Total
2/28/74	$ 5,190.39	$ 1,660.92	$ 6,851.31
5/31/74	5,190.39	1,349.50	6,539.89
8/31/74	5,190.39	1,038.08	6,228.47
11/30/74	5,190.39	726.65	5,917.04
2/28/75	5,190.39	415.23	5,605.62
	$143,421.62	$ 74,663.75	$218,085.37

Amount Now Due

Total Amount Due $218,085.37

Distribution:				
	0000	$23,108.11	3808	$ 6,863.57
	0008	7,754.93	3878	895.25
	0002	17,896.05	3872	16,114.50
	0100	5,169.97	3850	198.84
	0108	5,468.21	3858	5,488.11
	0178	8,948.00	3838	715.84
	0172	31,318.05	3832	12,527.25
	3800	954.94	9999	74,663.75

JM:db

Note: In order to expedite the crediting of your payment, please use the enclosed envelope to forward your reply to the Tax Compliance Bureau, State Campus, Albany, New York 12227.

The amount shown above is a balance due on your account. Prompt payment will avoid additional interest.

Exhibit E(2) – Attachment to Notice attached to Motion for Preliminary Inunction.

ST-572 (1-72)

ATTACHMENT TO ST-570 OR ST-571

Griffin, Inc.
U. S. Route 7
Arlington, Vermont

Sales Number	
90,756,431	
Identification Number	
Unregistered	

For Period August 1, 1965 to February 28, 1974

Explanation: The following tax is determined under the Provisions of Section 1138 of the Sales Tax Law, and is based on information contained in documents submitted in litigation against the State Tax Commission. It would be subject to modification upon audit of Corporation's books and records.

Period Ended	Tax	Penalty & Interest to 5/20/75	Total
8/31/65	$ 596.60	$ 715.20	$ 1,311.80
11/30/65	1,789.78	2,094.04	3,883.82
2/28/66	1,789.78	2,040.35	3,830.13
5/31/66	1,789.78	1,986.66	3,776.44
8/31/66	1,789.78	1,932.96	3,722.74
11/30/66	1,789.78	1,879.27	3,669.05
2/28/67	1,789.78	1,825.58	3,615.36
5/31/67	1,789.78	1,771.88	3,561.66
8/31/67	1,789.78	1,718.19	3,507.97
11/30/67	1,789.78	1,664.50	3,454.28
2/29/68	1,789.78	1,610.80	3,400.58
5/31/68	2,386.31	2,076.09	4,462.40
8/31/68	2,386.31	2,004.50	4,390.81
11/30/68	2,386.31	1,932.91	4,319.22
2/28/69	2,744.42	2,140.65	4,885.07
5/31/69	3,698.91	2,774.18	6,473.09
8/31/69	3,997.22	2,878.00	6,875.22
11/30/69	3,997.22	2,758.08	6,755.30
2/28/70	3,997.22	2,638.17	6,635.39
5/31/70	4,295.49	2,706.16	7,001.65
8/31/70	4,295.49	2,577.29	6,872.78
11/30/70	4,295.49	2,448.43	6,743.92
2/28/71	4,295.49	2,319.56	6,615.05
5/31/71	4,295.49	2,190.70	6,486.19
8/31/71	5,190.39	2,491.39	7,681.78
11/30/71	5,190.39	2,335.68	7,526.07
2/29/72	5,190.39	2,179.96	7,370.35
5/31/72	5,190.39	2,024.25	7,214.64
8/31/72	5,190.39	1,868.54	7,058.93
11/30/72	5,190.39	1,712.83	6,903.22
2/28/73	5,190.39	1,557.12	6,747.51
5/31/73	5,190.39	1,401.41	6,591.80
8/31/73	5,190.39	1,245.69	6,436.08
11/30/73	5,190.39	1,972.35	7,162.74

AFFIDAVIT OF ARTHUR E. WICKENDEN.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GRIFFIN, INC.,

Plaintiff,

v.

JAMES H. TULLEY, JR., et al.,

Defendants.

I, ARTHUR E. WICKENDEN, being duly sworn, upon my oath do depose and say the following:

1. I am the President of the Catamount National Bank of North Bennington, Vermont.

2. I have reviewed the balance sheet of Griffin, Inc. as of December 31, 1974, prepared by Robert J. Dimke.

3. I have been advised that the State of New York Sales Tax Bureau has issued a "Notice of Determination and Demand for Payment of Sales and Uses Taxes Due", in the amount of $216,085.37.

4. I have been advised that Griffin, Inc. disputes its liability for any part of this claim.

5. Despite the contention of Griffin, Inc., that it is not liable for these taxes, the existence of the claim represents at least a contingent liability of the corporation.

6. It is my opinion that the existence of this contingent liability for any significant period of time will have a substantial inhibiting effect upon the ability of Griffin, Inc., to obtain credit to meet its needs in the ordinary course of its business.

Affidavit of Robert J. Dimke.

Date: May 23, 1975

s/ Arthur E. Wickenden
Arthur E. Wickenden

(Sworn to on 5-23-75)

AFFIDAVIT OF ROBERT J. DIMKE.

(SAME TITLE).

I, ROBERT J. DIMKE, being duly sworn, upon my oath do depose and say the following:

1. I am an independent public accountant, with offices in Bennington, Vermont.

2. I have served, for several years, as the accountant to the plaintiff in this action, Griffin, Inc.

3. It is my opinion that the existence of a claim by the state of New York for sales taxes in the amount of $218,000.00 would, as a matter of accounting practice, be required to be shown on the balance sheet of plaintiff, at least as a contingent liability.

4. I am of the opinion, based upon my knowledge of the plaintiff's business, and my experience as an accountant, that the existence of such a contingent liability would seriously impair the ability of the plaintiff to carry on its business, because of its effect upon the plaintiff's ability to secure the credit which it needs in the ordinary course of its business.

Affidavit of John Lonergan.

5. I am also of the opinion that it would be impossible for Griffin, Inc., to raise, by borrowing or otherwise, $218,000.00 for deposit with the New York Tax Commission, if such a deposit were required to prosecute an appeal.

Date: May 29, 1975

s/ Robert J. Dimke
Robert J. Dimke

(Sworn to on 5-29-75)

AFFIDAVIT OF JOHN LONERGAN.

(SAME TITLE).

I, JOHN LONERGAN, being duly sworn, upon my oath do depose and say the following:

1. I am the President of Lonergan & Thomas, Inc., insurance agents, with offices in Bennington and Arlington, Vermont.

2. For many years I have been the principal insurance agent providing insurance for the plaintiff in this action, Griffin, Inc.

3. I have been asked by plaintiff's counsel to determine whether a bond securing taxes, interest, penalties and court costs could be obtained by the plaintiff, if such a bond were necessary to prosecute appeal procedures in the courts of New York State.

4. I am of the opinion, based upon my experience and my investigation of this matter, that such a bond is either not available, or, if available, would have to be fully collateralized or would bear a premium in an amount nearly equal to the amount to be secured by the bond.

Date: May 29, 1975

s/ John F. Lonergan
John Lonergan

(Sworn to on 5-29-75)

STIPULATION.

(SAME TITLE).

COME NOW the parties hereto, and, by their undersigned attorneys, stipulate as to the following facts. The parties agree that this stipulation is entered into for the purpose of expediting proceedings with respect to defendants' motion to dismiss and plaintiff's motion for a preliminary injunction, and this stipulation is entered into without prejudice to the right of either party to prove different or additional facts at later stages of this proceeding.

I. Background Facts

1. Plaintiff was incorporated in Vermont on or about March 25, 1946, under the name Kane-Griffin,

Inc. The name of the corporation was changed to Griffin, Inc. on February 4, 1953. The corporation has carried on a retail furniture business in Arlington, Vermont since its formation, and has had a store at its present location on the western side of U.S. Route 7 in Arlington, Vermont since approximately 1947.

2. Plaintiff store is located approximately 25 miles from the Massachusetts-Vermont border, and approximately 6 miles from the New York-Vermont border.

3. A substantial portion of plaintiff's sales are made to persons who are not residents of Vermont. A substantial portion of such interstate sales are to residents of New York.

4. Articles purchased from plaintiff are sometimes carried away from the store by purchasers, and especially with respect to purchases of furniture, are sometimes delivered to the purchaser in trucks owned by plaintiff.

5. Defendants Tully, Manley and Koerner are Commissioners of the New York State Tax Commission. Defendant Maloney is the Director of the Sales Tax Bureau of the New York Department of Taxation and Finance. Defendant Willey is the Senior Sales Tax Examiner of the Sales Tax Bureau of the New York State Department of Taxation and Finance.

6. On or about February 21, 1973, George Bradford, an associate sales tax examiner of the New York State Sales Tax Bureau came to plaintiff's place of business for the purpose of conducting an audit of the records of plaintiff, and advised officers of plaintiff that the purpose of such audit was the establishment of sales records upon which to base an assessment of New York State and local sales and use taxes owed by plaintiff. Plaintiff refused to permit Mr. Bradford to conduct an audit.

Stipulation.

7. On April 23, 1975, defendant Willey came to plaintiff's place of business for the purpose of conducting an audit of plaintiff's records in order to determine plaintiff's liability under New York's Sales and Use Tax Law. Plaintiff refused to permit such an audit.

8. The action of defendant Willey in seeking to audit the records of plaintiff, and of defendant Maloney in seeking to assess New York state and local sales and use taxes against plaintiff, was taken at the instance and on the instructions of defendants Tully, Koerner and Manley, who, as members of the Tax Commission of the State of New York are the employers and superiors of defendants Willey and Maloney.

9. On May 14, 1975, defendants caused to be issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due", showing an amount due of $218,085.37.

10. The Notice referred to in Paragraph 9 hereof is based on an estimate.

11. The issuance of the aforesaid Notice serves to commence collection procedures and appeal times, under the New York State Sales and Use Tax Law. Under New York law, Plaintiff will lose whatever rights it may have to appeal this notice to the New York State Tax Commission on or about August 11, 1975.

II. Contacts of Plaintiff With New York State

A. In General

1. Plaintiff has never been and is not now registered, qualified or authorized to do business in New York State.

2. Plaintiff has never owned any real property in New York State.

Stipulation.

3. Plaintiff does not solicit sales in New York State through salesmen, agents, or other representatives.

4. Plaintiff has no office, warehouse, showroom, or other facility of any kind in New York State.

B. Deliveries

1. Furniture purchased by residents of New York State from plaintiff is typically delivered to the purchaser in trucks owned by plaintiff, or occasionally by common carrier.

2. Such deliveries are made by employees of plaintiff. Furniture sometimes requires assembling or "setting-up", such as the attachment of legs to a table. This generally makes it impractical to use common carriers to deliver furniture.

C. Repairs

1. Employees of plaintiff enter New York State infrequently for the purpose of repairing furniture purchased from plaintiff.

2. A typical such repair would be the "touching-up" of scratches on wooden furniture.

3. No charge is made for such repair services.

D. Advertising

1. Plaintiff advertises through advertising media located in the Albany-Schenectady-Troy area of New York, and in Vermont.

2. Such advertising includes primarily radio advertising, newspaper advertising, occasional television advertising, and one roadside sign located near the Vermont border on New York Route 7.

3. The Albany-Schenectady-Troy area of New York is the only substantial metropolitan area located within plaintiff's primary marketing area.

4. WBTN, of Bennington, Vermont, is the only commercial radio station located in Bennington, Vermont. WBTN cannot be heard using ordinary radio receivers in large parts of Bennington County. Plaintiff advertises on WBTN.

5. WCAX, located in Burlington, Vermont, is the only commercial television station located in the state of Vermont.

6. WCAX-TV can, with few exceptions, be received in Bennington County only by cable. Cable service carrying WCAX-TV has only recently become available in Bennington, Vermont. Plaintiff does not advertise on WCAX-TV.

7. Bennington County, Vermont relies primarily on the Albany-Schenectady-Troy area of New York for radio and television broadcast media. For example, the three primary television stations which are received without cable in Bennington County, Vermont are WTEN (CBS), WRGB (NBC), and WAST (ABC), all located in the Albany-Schenectady-Troy area.

8. Plaintiff advertises on certain radio stations (and, in the past, has advertised on certain television stations) whose facilities are located entirely within New York State, and whose broadcast area includes southwestern Vermont.

9. Plaintiff advertises in the weekly joint television listings section of The Times-Union and The Knickerbocker News/Union-Star. These Newspapers are published in Albany, New York and circulated primarily in the Albany-Schenectady-Troy area of New York and in southwestern, Vermont. A copy of the advertisement

published in the listings for June 7-14, 1975 is attached here to as Exhibit "A."

E. Credit and Collection

1. Plaintiff sells furniture exclusively for cash, check, or bank credit cards, and does not itself extend credit to customers.

Dated this 7th day of July, 1975.

GRIFFIN, INC.

BY--WILLIAMS, WITTEN,
CARTER & WICKES
Its Attorneys

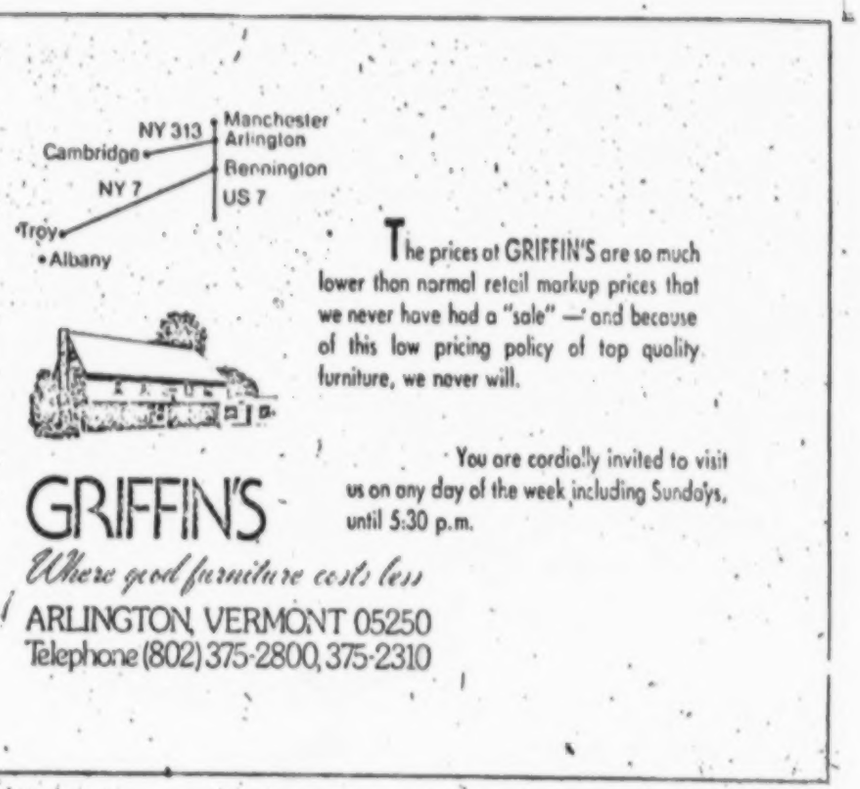
by s/ R. Paul Wickes
R. Paul Wickes
A member of the firm

JAMES H. TULLEY, JR.,
ET AL.

BY--LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

by s/ Thomas P. Zolezzi
Thomas P. Zolezzi
Assistant Attorney General

Exhibit A – Advertisement attached to Stipulation.



June 7-14, 1975

EXCERPTS FROM TRANSCRIPT OF HEARING of 8-1-75.

[8]

* * * * * * * * *

JUDGE COFFRIN: Well, aren't they submitting to the jurisdiction of the taxing authorities of the State of New York?

MR. ZOLEZZI: By filing a request for a hearing?

JUDGE COFFRIN: Yes.

MR. ZOLEZZI: No, they would not be submitting to New York State jurisdiction.

JUDGE OAKES: Well, on what do you base that?

[9]

MR. ZOLEZZI: On the word of counsel that this would not be submitting them to New York State overall jurisdiction it would just be a request for a hearing and then that, - it will be strictly for the purpose of stopping the statute from running.

* * * * * * * * *

[10]

MR. ZOLEZZI: If the plaintiff can come in and show that it falls into the MILLER case or the BELLA HESS case or any of those cases upon which it relies, the Tax Commission, upon review of the evidence, will annul the determination and the matter will be ended.

* * * * * * * * *

Excerpts from Transcript of Hearing of 8-1-75.

[13]

* * * * * * * * *

JUDGE HOLDEN: If you have the right to go into the, if the New York Tax Department, has the right to go, the right to examine the plaintiff's books in this case, what's to prevent the New York Tax Department from going to every establishment in Vermont or in New Jersey or Pennsylvania and say, "We think that you're selling goods, or delivering goods to New York State purchasers, and we want to go through your books and we want to see whether this is so or not, and we are going to make an assessment."

MR. ZOLEZZI: Well, I think that it's really a matter of practical application. In the present case the Complaint was made to the New York State Department of Taxation by a local furniture merchant who says, "merchants are coming into the State, they are selling articles and they are not charging tax. I have to charge tax which automatically makes my prices higher than theirs. Even if I was to charge the same amount, I have to charge tax and they are invading our area."

Based on that, that's when the New York State Department of Taxation and Finance went out to investigate the complaint. And, I seriously doubt that the Department of Taxation would hit every out-of-state merchant to determine

[14]

whether he was making deliveries into the State.

JUDGE OAKES: They would only hit those where there was a complaint by the local merchant?

MR. ZOLEZZI: By the local merchant.

Excerpts from Transcript of Hearing of 8-1-75.

[14]

JUDGE OAKES: Which might be great in number, or small in number?

MR. ZOLEZZI: It's possible.

* * * * * * * * *

[18]

* * * * * * * * *

JUDGE OAKES: Can the Appellate Division enjoin the enforcement of the, - of the - -

MR. ZOLEZZI: Not at the Article 78 level. In other words if he brings an Article 78 proceeding to review the determination, the Appellate Division cannot enjoin, --

JUDGE OAKES: "Collection"?

MR. ZOLEZZI: "Collection." As a matter of practice, the Tax Department does not enforce collection. But the Appellate Division cannot enjoin them, - - - in an Article 78 proceeding.

* * * * * * * * *

LETTER OF THOMAS P. ZOLEZZI TO CLERK U.S. DISTRICT COURT, DISTRICT OF VERMONT, dated 8-4-75.

Telephone (518) 474-1394

August 4, 1975

Honorable Edward J. Trudell, Clerk
United States District Court
Burlington, Vermont

Re: Griffin, Inc. v. Tulley, et al.
Civil Action File No. 75-104

Dear Mr. Trudell:

The above-mentioned case was argued before a three-judge court in Brattleboro, Vermont on August 1, 1975. At that hearing, the Honorable James L. Oakes, United States Circuit Judge, inquired as to whether the New York State Department of Taxation and Finance would be willing to cancel the assessment in the above-mentioned case and reissue the said assessment. This request was made because the time in which the plaintiff could request a hearing for a redetermination by the New York State Tax Commission as to the assessment will expire on August 11, 1975. By cancelling the assessment and reissuing it, the plaintiff would have an additional 90 days from the date of the reissued assessment to request a hearing for a redetermination. This 90-day extension would also allow the three-judge court sufficient time to determine whether it has jurisdiction over this action.

Please be advised that the New York State Department of Taxation and Finance has agreed to cancel the assessment and reissue an up-dated assessment against the plaintiff. The assessment shall be canceled and reissued no later than August 8, 1975.

Letter of Thomas P. Zolezzi to Clerk U.S. District Court, District of Vermont, dated 8-4-75.

Honorable Edward J. Trudell, Clerk
United States District Court 2.

By telephone conversation of August 4, 1975, I informed Judge Oakes' law clerk that the assessment would be canceled and reissued.

This cancellation and reissuing of the assessment is being made with the understanding that no rights of the New York State Department of Taxation and Finance shall be jeopardized by said cancellation and reissuance of the assessment.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By

THOMAS P. ZOLEZZI
Assistant Attorney General

TPZ:jb

cc: Williams, Witten, Carter & Wickes, Esqs.
Attention: R. Paul Wickes, Esq.

Honorable James L. Oakes

Honorable Max Kuperman

CANCELLATION OF ASSESSMENT AND STATEMENT OF REISSUE.

ST-572 (11-72)

ATTACHMENT TO ST-570 OR ST-571

Notice Number 90,756,909
Identification Number Un-Registered
August 8, 1975
ECB-Albany-8

Griffin, Inc.
U.S. Route 7
Arlington, Vermont

For Period: August 1, 1965 to May 31, 1975

Explanation: The following tax is determined on the basis of information obtained from the Department of Taxes, State of Vermont. It would be subject to modification upon audit of corporation's books and records.

Period Ended	Tax Due	Penalty & Interest to 8/20/75	Total
8/31/65	$ 761.56	$ 936.72	$1,698.28
11/30/65	2,284.68	2,741.62	5,026.30
2/28/66	2,284.68	2,673.08	4,957.76
5/31/66	2,284.68	2,604.54	4,889.22
8/31/66	2,284.68	2,535.99	4,820.67
11/30/66	2,284.68	2,467.45	4,752.13
2/28/67	2,284.68	2,398.91	4,683.59
5/31/67	2,284.68	2,330.37	4,615.05
8/31/67	2,284.68	2,261.83	4,546.51
11/30/67	2,284.68	2,193.29	4,477.97
2/29/68	2,284.68	2,124.75	4,409.43
5/31/68	3,427.02	3,084.32	6,511.34
8/31/68	3,427.02	2,981.51	6,408.53
11/30/68	3,427.02	2,878.70	6,305.72
2/28/69	3,807.80	3,084.32	6,892.12
5/31/69	4,721.66	3,682.89	6,404.55
8/31/69	5,248.24	3,936.18	9,184.42
11/30/69	5,248.24	3,778.73	9,026.97
2/28/70	5,002.76	3,451.90	8,454.66
5/31/70	5,244.20	3,461.17	8,705.37
8/31/70	5,244.20	3,303.85	8,548.05
11/30/70	5,244.20	3,2 6.52	8,390.72
2/28/71	6,127.40	3,492.62	9,620.02
5/31/71	6,568.99	3,547.25	10,116.24
8/31/71	7,937.53	4,048.14	11,985.67

Cancellation of Assessment and Statement of Reissue.

ST-570 (10/65)

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
SALES TAX BUREAU
STATE CAMPUS
Albany, New York 12226

NOTICE OF DETERMINATION AND DEMAND FOR PAYMENT OF SALES AND USE TAXES DUE

Notice Number 90,756,909
Date of Notice August 8, 1975
Identification Number Un-Registered

Griffin, Inc.
U.S. Route 7
Arlington, Vermont

Make payment promptly at your State District Tax Office. ECB-Albany-8

Make remittance payable to New York State Sales Tax Bureau.

Please show notice number on face of check or money order.

Return one copy of this notice with your payment.

NOTE: This determination shall be final unless an application for a hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax.

The tax stated below is for the period

Explanation:
Continued

Amount Now Due

Period Ended	Tax Due	Penalty & Interest to 8/20/75	Total
11/30/71	$7,937.53	$ 3,810.01	$11,747.54
2/29/72	8,037.41	3,616.83	11,654.24
5/31/72	8,087.35	3,396.69	11,484.04
8/31/72	8,087.35	3,154.07	11,241.42
11/30/72	8,087.35	2,911.45	10,998.80
2/28/73	6,464.16	2,133.17	8,597.33
5/31/73	5,652.56	1,695.77	7,348.33
8/31/73	5,652.56	1,526.19	7,178.75
11/30/73	5,652.56	2,487.13	8,139.69
2/28/74	5,970.98	2,268.97	8,239.95
5/31/74	6,130.19	1,961.66	8,091.85
8/31/74	6,130.19	1,593.85	7,724.04
11/30/74	6,130.19	1,226.04	7,356.23
2/28/75	5,310.65	743.49	6,054.14
5/31/75	4,900.88	392.07	5,292.95
Total	$192,516.55	$106,064.04	$298,580.59

Distribution:

0000-$28,050.80	0008-$10,154.22	0002-$24,406.76
0100- $8,884.88	0108- $7,052.55	3838- $1,094.82
0178-$11,845.38	0172- $42,711.83	3800- $1,827.76
3808- $8,785.60	3878- $1,368.55	3872-$21,966.30
3850- $253.85	3858- $7,028.70	
3832-$17,084.55	9999-$106,064.04	

The amount shown above is a balance due on your account. Prompt payment will avoid additional interest.

Cancellation of Assessment and Statement of Reissue.

ATTACHMENT TO ST-570 OR ST-571

Notice Number
90,756,909
Identification Number
Un-Registered

August 8, 1975

TCB-Albany-Z

Griffin, Inc.
U. S. Route 7
Arlington, Vermont

Note: This Notice supercedes Notice Number 90,756,431 dated 5/14/75.

Note: In order to expedite the crediting of your payment, please use the enclosed envelope to forward your reply to the Tax Compliance Bureau, State Campus, Albany, New York 12227

JM:sec

LETTER OF R. PAUL WICKES TO CLERK, U.S. DISTRICT COURT, DISTRICT OF VERMONT, dated 8-14-75.

WILLIAMS, WITTEN, CARTER & WICKES
ATTORNEYS
115 Elm Street, Bennington, Vermont 05201
802-442-8111

August 14, 1975

Mr. Edward J. Trudell, Clerk
United States District Court
Federal Building
Burlington, Vermont

Re: Griffin, Inc. v. Tulley, et al.
Civ. No. 75-104

Dear Mr. Trudell:

I am writing to advise the Court of two developments in this case which have occurred since the hearing on August 1, 1975. Because these matters may effect the disposition of the Plaintiff's Motion for a Preliminary Injunction, I would appreciate your bringing this letter to the attention of Judges Oakes, Holden and Coffrin at your earliest convenience.

By letter to you dated August 4, 1975, Mr. Zolezzi indicated that the defendants had agreed to cancel the tax assessment which had been issued on May 14, 1975. My understanding of the purpose of that cancellation, based upon the discussion between Mr. Zolezzi and the Court at the hearing on August 1, was that it was intended to moot the plaintiff's request for a preliminary injunction, by removing the 90-day deadline which follows the issuance of an assessment.

Letter of R. Paul Wickes to Clerk, U.S. District Court, District of Vermont, dated 8-14-75.

Enclosed is a copy of a new assessment, dated August 8, 1975, which indicates that it "supersedes" the previous assessment. The defendants have done no more than extend the appeal period for another ninety days, to approximately November 7 of this year.

In addition, page 2 of the assessment contains the following statement:

> The following tax is determined on the basis of information obtained from the Department of Taxes, State of Vermont.

Although we have not been able to determine the basis on which the defendants obtained such information from the State of Vermont, it would appear that the defendants may have commenced some type of enforcement proceedings, under some agreement between the tax departments of New York and Vermont.

We would suggest, therefore, that our Motion for Preliminary Injunction has not been mooted by the action of the defendants, but continues to require resolution by the Court.

Sincerely yours,

R. Paul Wickes

lmb

cc: Thomas P. Zolezzi, Esq.

OPINION OF UNITED STATES DISTRICT COURT FOR DISTRICT OF VERMONT.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Griffin, Inc.

v.

James H. Tully, Jr., A. Bruce Manley, Milton Koerner, Francis X. Maloney and John Willey

Civil Action File No. 75-104

Before: Oakes, Circuit Judge and
Holden and Coffrin, District Judges

Paul R. Wickes, Esq., Williams, Witten, Carter and Wickes, Bennington, Vermont for plaintiff.

Thomas P. Zolezzi, Esq., Assistant Attorney General, Albany, New York, and Peter Joslin, Esq., Theriault and Joslin, Montpelier, Vermont, for defendants.

COFFRIN, District Judge.

This case arises out of an attempt by various officials of the New York State Tax Commission and the Department of Taxation and Finance to require a Vermont corporation to collect New York Sales and Use Tax revenues.

A. Background

Plaintiff is a Vermont corporation which operates a retail furniture business in Arlington, Vermont, about six miles from the New York-Vermont border. A substantial amount of plaintiff's total sales are made to

out-of-state customers, and of this interstate business a substantial portion involves New York residents.

On February 21, 1973, an associate sales tax examiner from the New York Sales Tax Bureau came to Griffin's store for the purpose of auditing plaintiff's books to establish a sales record which would then be the basis of an assessment of the New York sales and use taxes claimed to be owed by Griffin. [1] Plaintiff refused to allow an audit at that time. Matters rested there for more than two years, but on April 23, 1975, defendant Willey, a senior tax examiner, came to conduct an audit at the direction of defendants Tully, Koerner, and Manley who are members of the Tax Commission. Plaintiff again refused to allow an audit and served the complaint in this lawsuit at that time. Defendants subsequently issued a "Notice of Determination and Demand for Payment of Sales and Use Taxes Due" showing an amount of $218,085.37. The assessment was based on an estimate rather than any hard data concerning plaintiff's sales records. Subsequently, a second assessment in the amount of $298,580.59 was issued which superseded the original notice. [2]

Griffin seeks a declaratory judgment that any assessment, levy, or collection against it would violate the Commerce, Due Process, and Equal Protection clauses of the Constitution. Plaintiff also seeks permanent injunctive relief. After receiving the complaint, defendants filed a motion to dismiss on the ground that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. Plaintiff subsequently filed a motion for a preliminary injunction on May 30, 1975 and in its

memorandum requested that a three-judge court be convened. This court was convened, and the motions to dismiss and for a preliminary injunction were argued on August 1, 1975.

B. Preliminary Matters

It is clear that except for the possible application of section 1341 we would have jurisdiction of this matter. The complaint raises substantial federal questions arising under the Commerce clause and the fourteenth amendment. Hagans v. Lavine, 415 U.S. 528 (1974). Plaintiff appears to have stated a claim based directly on the constitution and since there is more than $10,000 in controversy, we have jurisdiction under 28 U.S.C. §1331(a). Additionally, 42 U.S.C. §1983 provides a cause of action for deprivation of constitutional rights under color of state law and we also have jurisdiction under 28 U.S.C. §1343(3).

A three-judge court is appropriate in this case because the complaint seeks to enjoin state officials from executing a state statute, [3] raises substantial constitutional questions, [4] and alleges a basis for injunctive relief. [5] See Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 94 (1974). Only a three-judge court has the authority to issue even an interlocutory injunction. 28 U.S.C. §2281. Although a single judge can entertain a motion to dismiss for lack of subject matter jurisdiction, Id. at 100, it is certainly permissible for a three-judge court to do so, Ammex-Champlain Corp. v. Gallman, Civil Nos. 72-306, 72-310 (N.D.N.Y. Mar. 13, 1973), aff'd 414 U.S. 802 (1973), particularly where consolidation of the motions for hearing may save judicial time and energy.

C. Motion to Dismiss

We turn first to defendants' motion to dismiss the complaint pursuant to 28 U.S.C. §1341. Although by its terms section 1341 only forbids a district court to award injunctive relief, the policy considerations which underlie the statutory command preclude an award of declaratory relief as well. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943). Clearly, if we lack the ability to grant Griffin the relief it seeks, the case must be dismissed. In that event, it would be unnecessary to reach the merits of plaintiff's motion for a preliminary injunction.

In support of their motion to dismiss defendants argue that there are two available remedies. The first is and administrative appeal to the Tax Commissioners and from there to the New York courts as set forth in section 1138 of the Sales and Use Tax Law.[6/] The other remedy is a declaratory judgment action under section 3001 of the New York Civil Practice Law and Rules (CPLR). We conclude, however, that neither is "plain, speedy and efficient" within the meaning of 28 U.S.C. §1341.

1. Administrative Appeal

New York Sales and Use Tax Law section 1138 provides that a taxpayer may request an administrative review of the initial assessment in a proceeding before the Tax Commission. The Commission in turn may be reviewed by a CPLR article 78 proceeding. Article 78 review, however, requires that the taxpayer pay the tax or post a bond to stand for taxes, penalties and interest. Sales and Use Tax Law §1138(a). This prerequisite to judicial review is a major hurdle in Griffin's

case since plaintiff has been assessed a tax liability of $298,580.59, a figure it states is well beyond its ability to pay. Defendants point out however, that this figure is only an estimate which might be substantially reduced upon audit. At this juncture we have no way of knowing what figure an audit would disclose. However, even if an audit would result in a lower assessment, plaintiff objects to having to submit to such a procedure at the hands of a state which it claims has no jurisdiction to conduct an audit in any event.

In order to assert its rights or test its claim, Griffin should not be obliged as a condition precedent to make a choice between paying an assessment or posting a bond in an admittedly arbitrary amount or turning over its books and records to a state whose authority it claims is invalid. United States Steel Corp. v. Multistate Tax Commission, 367 F.Supp. 107, 116 (S.D.N.Y. 1973). Whether New York has the authority to require Griffin to collect the New York Sales and Use Tax involves questions of constitutional law, but there is no indication that the Commission is competent to determine constitutional issues.[7/] The Tax Commission redetermines the tax after an initial assessment has been challenged. The redetermination then can be reviewed "for error, illegality or unconstitutionality or any other reason whatsoever . . ." by an article 78 proceeding. Sales and Use Tax Law §1138(a). Since Griffin does not have to submit to an audit prior to having its constitutional claim heard and since the Tax Commission may be limited to reviewing the computation of tax without competence to resolve constitutional questions, plaintiff and defendants have reached an impasse.

Under the procedures laid down by section 1138 Griffin's first opportunity to air its constitutional claims

may well be in an article 78 proceeding, but it is not clear that such judicial review would be available to plaintiff if it steadfastly refuses to submit to audit. Presumably, a hearing before the Tax Commission is a prerequisite to an article 78 proceeding, but if plaintiff refuses to submit to Tax Commission authority, then it may jeopardize its article 78 appeal rights. Under these circumstances refusing to allow inspection of books and records might be likened to a failure to exhaust administrative procedures prior to the right to appeal.

In addition to doubts concerning the adequacy of article 78 review, there is one practical consideration of the utmost significance. Even if judicial review is technically available for all issues, Griffin may be unable to present its arguments because of the prepayment or bond requirement. It is fair to assume that the initial assessment of $298,580.59 would remain unchanged since the Commission would be unable to revise or verify the preliminary estimate without examing Griffin's books and records. Since it is clear that Griffin is unable to pay the present assessment or to post bond in that amount, the issue is whether the requirement that plaintiff post bond or prepay the tax plus penalties and interest is a condition which renders an article 78 proceeding inadequate for purposes of section 1341. The general rule is that a state may require a taxpayer to litigate from a refund posture even when he questions the validity of the tax itself. Great Lakes Dredge & Dock Co. v. Huffman, supra at 301. This remedy may be harsh, but there is no indication that it violates due process. Jackson v. Metropolitan Edison Co., 483 F.2d 754, 761 (3d Cir. 1973), aff'd 419 U.S. 345 (1974). But in some instances the assessment poses such a heavy burden

that to deny equitable relief is to deny judicial review entirely. Denton v. City of Carrollton, 235 F.2d 481, 485 (5th Cir. 1956). In such instances a federal court may award equitable relief.

Extraordinary circumstances are present in this case which bring Griffin within the exception to the general rule. New York officials have admitted that the assessment represents an estimate of a liability which is itself contingent on whether the tax may be constitutionally applied. Even if it is liable for some tax, plaintiff claims that this estimate is grossly inflated. Plaintiff should not have to prepay or post bond in an entirely arbitrary amount that may bear little relationship to any eventual liability. Second, the bond or prepayment requirement is a prohibitive barrier to an article 78 hearing because Griffin cannot raise the necessary funds by borrowing or otherwise. A bond is not available except at a premium nearly equal to its face value or unless fully supported by collateral. (Affidavits of Robert Dimke, John Lonergan). Finally, an assessment of this magnitude is clearly coercive in its effect. Griffin must carry the assessment on its books as a contingent liability which will severely hamper it in obtaining the credit it needs in the ordinary course of business. (Affidavits of Robert Dimke, Arthur Wickenden). If Griffin cannot carry on its affairs with this assessment outstanding, it must accede to the desires of the New York State officials or face the dire consequences customarily attendant upon a business which cannot meet its credit requirements.

In short, we have no assurance that New York courts would even entertain a suit seeking review of a final determination of tax liability where the taxpayer refused to submit to the Tax Commission's authority.

Furthermore, the prepayment or bond requirement in effect denies article 78 review in this instance. Consequently, we are of the opinion that the administrative review procedure does not afford a "plain, speedy or efficient remedy."

2. Declaratory Judgment

Defendants claim that New York's CLPR §3001 provides for a declaratory judgment remedy. They argue that Griffin could present its constitutional claims without having to submit to an audit, prepay the assessed tax, or post bond in that amount. There are several difficulties with this remedy, however, which lead us to conclude that it does not satisfy section 1341.

Section 1140 of the Sales and Use Tax Law provides:

> §1140. REMEDIES EXCLUSIVE.--The remedies provided by sections eleven hundred thirty-eight and eleven hundred thirty-nine shall be exclusive remedies available to any person for the review of tax liability imposed by this article; and no determination or proposed determination of tax or determination on any application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any action or proceeding other than a proceeding under article seventy-eight of the civil practice law and rules. (Emphasis added).

While the language of section 1140 apparently forecloses any declaratory judgment remedy, defendants claim that the case law has substantially diffused the effect of this forceful statement. New York courts have held that a declaratory judgment action may be

maintained despite statutory language making a review proceeding exclusive if the taxpayer challenges the tax as unconstitutional or inapplicable to his case. Richfield Oil Corp. v. City of Syracuse, 287 N.Y. 234, 239 (1942). The general rule stated in Richfield has been applied specifically to section 1140 by a lower appellate court. Hospital Television Systems, Inc. v. New York State Tax Commission, 41 A.D.2d 576 (3d Dept. 1973). In addition, some federal cases have assumed that a declaratory judgment remedy was available in dismissing taxpayer actions for injunctive relief on the grounds that an adequate state remedy existed. Hickmann v. Wujick, 488 F.2d 875, 876 (2d Cir. 1973). Ammex-Champlain Corp. v. Gallman, supra. Nevertheless there appears to be a contradiction between the plain language of section 1140 and the few cases we have found which cloaks this issue in some uncertainty.

When there is uncertainty with regard to the adequacy of a state remedy, a federal court may retain jurisdiction and give appropriate relief. Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105-106 (1944). Clearly, if a remedy is entirely unavailable, it would be inadequate. Since it is not certain that a declaratory judgment is available in this instance, we cannot be sure that the remdy in question is adequate.

But even if it were certain that section 3001 is available, a declaratory remedy standing alone may still be inadequate. Spector Motor Co. v. McLaughlin, supra.[8/] In Ammex the court ruled that the apparent inability of New York courts to give injunctive relief was not crucial, but there are important distinctions between Ammex and this case which lead us to the opposite conclusion. Ammex-Champlain sold cigarettes

and liquor to travelers going from the United States to Canada. The corporation maintained sales offices and warehouses at various points on the New York side of the border. The warehouses were located so that one could only go into Canada after picking up one's merchandise. This unique physical arrangement gave rise to a claim that the sales were exempt from state tax under both the Commerce and Export-Import clauses of the Constitution. The important point is that the corporation was clearly present in New York State, and therefore it could expect to litigate in New York courts. But Griffin's contacts with New York are minimal.[9/] For this reason it seems unfair to make Griffin litigate in an unfamiliar forum.[10/] Plaintiff's unfamilarity with New York courts is a counterweight to the reasons for requiring a taxpayer to raise his objections to an assessment in the courts of the taxing state. This counterweight admonishes us to exact a somewhat higher degree of certainty regarding the adequacy of New York's declaratory judgment remedy than was appropriate in Ammex. But though a higher standard of certainty should obtain, we do not have the same basis for confidence regarding the availability of preliminary relief should the need arise. In Ammex the parties agreed that there would be no collection attempt pending a New York court's decision on the merits, but there is no such stipulation in this case. Defendants argue that preliminary injunctive relief would be available in New York courts, but we have reservations on this score as seemingly did the court in Ammex.

Accordingly, we hold that in the circumstances of this case New York's declaratory judgment remedy is neither so certainly available nor so clearly adequate as to preclude our jurisdiction to issue injunctive relief.

Since neither of the remedies available to plaintiff in New York are "plain, speedy and efficient," we have the power to grant injunctive relief and this lawsuit need not be dismissed.

D. Motion for Preliminary Injunction

We turn now to Griffin's motion for a preliminary injunction. In deciding whether to grant or deny preliminary relief the two primary considerations are plaintiff's chance of eventual success on the merits and the potential for irreparable injury if interlocutory relief is not granted. It is also important to balance the potential hardship to both plaintiff and defendants and to ascertain where the public interest lies. New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service, Doc. No. 74-2630, at 5668-69 (2d Cir. Aug. 18, 1975).

1. Irreparable Injury

Griffin may well suffer irreparable injury from New York collection attempts once the assessment becomes final. Griffin is vulnerable because it makes deliveries to New York purchasers in its own trucks. If plaintiff continues this practice the trucks and merchandise could be seized.[11/] Seizures would disrupt business, frustrate customers, and result in loss of sales. Griffin's alternative would be to completely change its present mode of operation. New York may also attempt collection in Vermont by lawsuit and liens on property. In short, vigorous collection attempts could cripple and perhaps destroy Griffin's business.

Another potential injury stems from the fact that Griffin will be unable to contest the amount of its

liability should we ultimately decide that New York does have the authority to require plaintiff to collect the tax. Griffin claims the current assessment is excessive, but section 1138 requires that anyone wishing to challenge an assessment must request a hearing before the Tax Commission within 90 days of notice. The assessment was issued on August 8, 1975. Unless the 90 day period is tolled, the time for requesting a hearing almost assuredly will have passed before we reach a decision on the merits.

Finally, the assessment will appear as a black mark on Griffin's balance sheet. Griffin must carry the assessment as a contingent liability which will substantially impair plaintiff's ability to secure the credit it needs in the ordinary course of business.

Griffin clearly needs preliminary relief to prevent it from suffering irreparable injury, and defendants will not be harmed by some delay. Although the court takes judicial notice of the fact that some state and municipal governments are currently hard-pressed to meet their financial obligations, collection of this assessment will not make the difference between financial stability and ruin.[12/] On balance, Griffin deserves protection if it can show a likelihood of success on the merits.

2. Probability of Success on The Merits

New York seeks to hold a Vermont corporation responsible for the collection of New York's sales and use tax on furniture sales to New York residents. In Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-345 (1954), Justice Jackson discussed a similar taxing scheme set up by the State of Maryland. The economic effect of holding Griffin liable for collection of the sales

and use tax is to protect New York businesses by putting out-of-state retailers on the same footing as local merchants for sales to New York residents. But as distinguished from a direct tax on a sale, liability here arises only on the importation of the furniture into New York, an event which occurs after title has passed and of which Griffin may have no knowledge. Since the sale in Vermont establishes no link between Griffin and New York, the issue is whether Griffin's acts or course of dealing has subjected it to New York's taxing authority or has afforded New York jurisdiction to saddle Griffin with responsbility for tax collection. Due process requires some minimum link between a state and the person, property, or transaction it seeks to tax.

Miller Bros. involved a situation almost identical to the one before us now. A Delaware furniture corporation operating in Wilmington made sales to Maryland residents. Customers sometimes took their purchases with them, but usually Miller Bros. delivered the items in its own trucks or by common carrier. The only difference of any colorable significance between Griffin's operation and those of the Delaware firm is that Miller Bros. advertised only in Wilmington newspapers, radio, and television while Griffin uses media based in the Albany-Schenectady-Troy region of New York. This difference is not important, however, since residents of Bennington County, Vermont, Griffin's primary marketing area, rely on New York media. Miller Bros. advertising reached Maryland and Delaware residents alike just as Griffin's reaches residents of New York and Vermont. The site of a broadcasting tower or a printing press should not be controlling. Neither Miller Bros. nor Griffin made a special appeal to out-of-state residents.

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Because of the similarities, the Supreme Court's decision in Miller Bros. holding that Maryland had exceeded its authority is extremely persuasive precedent. Other cases which uphold a state's taxing power are distinguishable on their facts. In General Trading Co. v. Tax Commission, 322 U.S. 335 (1944), a corporation based in Minnesota sent traveling salesmen into Iowa to solicit orders for merchandise which the home office then sent to Iowa by common carrier or mail. Similarly, in Scripto v. Carson, 362 U.S. 207 (1960), a division of Scripto based in Atlanta solicited orders in Florida by using Florida residents as jobbers. Scripto assigned jobbers a specific territory and paid them on a commission basis. In Miller Bros. Justice Jackson distinguished General Trading on the ground that the subject corporation sent its sales representatives into the taxing state, a distinction we are inclined to follow in the case at hand.

Since Griffin has demonstrated a likelihood of success on the merits and on balance a need for interlocutory relief, a preliminary injunction will issue.

Accordingly, defendants' motion to dismiss is denied. Plaintiff's motion for a preliminary injunction is hereby granted. Defendants are temporarily enjoined from attempting to collect the tax assessed against plaintiff. Defendants are ordered to revoke the notice of assessment dated August 8, 1975 and hold further collection proceedings in abeyance pending a determination of this matter on the merits.

s/ James L. Oakes
United States Circuit Judge

s/ James S. Holden
United States District Judge

s/ Allen W. Coffrin
United States District Judge

October 20th, 1975.

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FOOTNOTES

1/ Defendants maintain that by reason of plaintiff's activities in New York State the plaintiff is a vendor as defined by section 1101(b) (8)(i) of the Tax Law. As such defendants claim Griffin is required to register, collect and remit sales taxes on sales of tangible personal property delivered in New York State, is personally liable for sales taxes not collected and remitted and must permit examination of its records. The duties of a vendor are found in sections 1105(a), 1105 (c)(3), 1131(1), 1132(a), 1133(a), 1134 and 1135 of the Tax Law of the State of New York. For purposes of this opinion and order it is only necessary to note that defendants seek to impose collection of the New York Sales and Use Tax on plaintiff, a Vermont corporation, and plaintiff seeks to resist that effort. Accordingly, it is unnecessary to set forth the appropriate provisions of the statute in detail.

2/ The original notice was issued on May 14, 1975. Under section 1138(a) of the Sales and Use Tax Law, a party has 90 days to apply to the Tax Commission for a hearing on the assessment. This peri l would have run out on August 11, 1975, however, the Commission cancelled the May 14, 1975 notice and issued a superseding notice on August 8, 1975. The new notice shows an assessment of $298,580.59. Thus plaintiff has not as yet lost his right to appeal to the Tax Commission, but the new assessment is larger by approximately $80,000.00.

3/ Moody v. Flowers, 387 U.S. 97 (1967).

4/ Goosby v. Osser, 409 U.S. 512 (1973).

5/ Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 713 (1962).

6/ § 1138. Determination of tax

(a) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accomodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same. After such hearing the tax commission shall give notice of its determination to the person against whom the tax is assessed. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of

any tax sought to be reviewed, with penalties and interest thereof, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereon stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application.

(b) If the tax commission believes that the collection of any tax will be jeopardized by delay it may determine the amount of such tax and assess the same, together with all interest and penalties provided by law, against any person liable therefor prior to the filing of his return and prior to the date when his return is required to be filed. The amount so determined shall become due and payable to the tax commission by the person against whom such a jeopardy assessment is made, as soon as notice thereof is given to him personally or be registered or certified mail. The provisions of subdivision (a) of this section shall apply to any such determination except to

the extent that they may be inconsistent with the provisions of this subdivision. The tax commission may abate any jeopardy assessment if it finds that jeopardy does not exist. The collection of any jeopardy assessment may be stayed by filing with the tax commission a bond issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance as to solvency and responsibility, conditioned upon payment of the amount assessed and interest thereon, or any lesser amount to which such assessment may be reduced by the tax commission or by a proceeding under article seventy-eight of the civil practice law and rules as provided in subdivision (a), such payment to be made when the assessment or any such reduction thereof shall have become final and not subject to further review. If such a bond is filed and thereafter a proceeding under article seventy-eight is commenced as provided in subdivision (a), deposit of the taxes, penalties and interest assessed shall not be required as a condition precedent to the commencement of such proceeding. Where a jeopardy assessment is made, any property seized for the collection of the tax shall not be sold (1) until expiration of the time to apply for a hearing as provided in subdivision (a) of this section, and (2) if such application is timely filed, until the expiration of four months after the tax commission has given notice of its determination to the person against whom the assessment is made; provided, however, such property may be sold at any time if such person has failed to attend a hearing of which he has been duly notified, or if he consents to the sale, or if the tax

commission determines that the expenses of conservation and maintenance will greatly reduce the net proceeds, or if the property is perishable.

(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

7/ Defendant argues that the Commission is competent to decide questions as to its own authority, but they have not cited any authority for this proposition.

8/ Declaratory relief was available in Spector; nevertheless the Supreme Court held that a federal court should retain jurisdiction of the suit in order to give appropriate equitable relief. A complicating factor in Spector, however, was the fact that there were undecided questions of state tax law which potentially could have disposed of the case in plaintiff's favor without reaching the constitutional claims. Since there was a declaratory judgment remedy where those questions could be decided, the Supreme Court instructed the district court to abstain while the parties litigated these matters in state court. Abstention would be improper in this case, however, because there is no indication that there are undecided questions under New York's tax law, and furthermore, the declaratory judgment remedy is not completely certain. Township of Hillsborough v. Cromwell, 326 U.S. 620, 629 (1946).

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9/ Plaintiff owns no realty and has no place of business in New York. It does not solicit business in New York through any sort of representative. Plaintiff does advertise in the media which serve the Albany-Schenectady-Troy region. This is the only metropolitan area within plaintiff's marketing area. Vermont based media do not cover all of plaintiff's Vermont marketing area so Griffin relies in part on New York newspapers, television channels, and radio stations whose coverage includes southwestern Vermont. In addition to advertising in New York media, Griffin also delivers merchandise to New York buyers in plaintiff's own trucks or occasionally by common carrier. Upon delivery, plaintiff's employees may assemble pieces of furniture. Occasionally employees return to "touch up" or repair minor defects. No charge is made for such services.

10/ Plaintiff, a Vermont corporation, has never been and is not now registered or qualified or authorized to do business in New York State. We need not decide whether, despite this fact, it has sufficient contacts with the State of New York to subject its person to the jurisdictional power of the New York courts. International Shoe Co. v. Washington, 326 U.S. 310 (1945). But it is clear that in order to avail itself of either the section 1138--article 78 proceeding or section 3001 declaratory judgment remedy Griffin would have to submit itself to the jurisdiction of the New York courts and thereby deprive itself of any possibility of asserting a claim that it was not subject to such jurisdiction. It should not be forced to litigate in New York at the risk of losing the opportunity to raise this issue. A remedy can hardly be said to be "plain, speedy and efficient" if the only way a party can take advantage thereof is to abandon a valid right which it possesses.

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11/ Exhibit D(2) to plaintiff's motion for a preliminary injunction is a news release forwarded to plaintiff by defendant Maloney. The news release concerns roadblocks which were set at three bridges leading from New Jersey to Staten Island to discover shipments of household appliances, furniture and other merchandise trucked into New York from New Jersey by merchants who had not collected the New York sales tax. Although the news release does not indicate that any seizures occurred, it would appear that a roadblock could lead to a seizure.

12/ In fact, upon oral argument counsel for the defendants indicated that the assessment against Griffin was brought about largely, if not entirely, as the result of New York competitors' complaints to the Tax Department.

NOTICE OF APPEAL.

(SAME TITLE).

SIRS:

PLEASE TAKE NOTICE that the defendants hereby appeal to the United States Supreme Court from the judgment and order of this Court entered October 20, 1975 in its entirety which denied defendants' motion to dismiss the action for lack of subject matter jurisdiction; and which temporarily enjoined the defendants from attempting to collect the tax assessed against the plaintiff and ordered the defendants to revoke the notice of assessment dated August 8, 1975, and hold further collection proceedings in abeyance pending a determination of the matter on the merits.

This appeal is taken pursuant to 28 U. S. C. §1253.

Dated: Albany, New York, November 7, 1975

Yours, etc.,

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State of New York
Attorney for Defendants
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By s/ Thomas P. Zolezzi
Thomas P. Zolezzi
Assistant Attorney General

Notice of Appeal.

TO:

HON. EDWARD J. TRUDELL
Clerk of the Court
United States District Court
For District of Vermont
Federal Building
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RELEVANT DOCKET ENTRIES IN U.S. DISTRICT COURT FOR DISTRICT OF VERMONT.

Dist/Office	YR.	Number	MO.	Day	Year	J	N/S
210-2	75	104	04	22	75	3	950

O	R	23	$	Other	Number	DEM.
1			Decl. judgmt		-202 1006	
			Prel. injunc.		1007	

YR.	NUMBER
75	-104

PLAINTIFFS | DEFENDANTS

GRIFFIN, INC. | vs. | TULLY, James H., Jr., A. Bruce MANLEY, Milton KOERNER, Francis X. MALONEY, and John WILLEY

CAUSE

Plaintiff alleges New York State and local sales and use taxes are in violation of the commerce, due process, and equal protection clauses of the United States Constitution.

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Relevant Docket Entries in U.S. District Court for District of Vermont.

FILING FEES PAID

Date	Receipt Number	C.D. Number
4-22-75	#24091 15.00	
11-11-75	#24458 5.00	#22

☐ Check here if case was filed in Forma Pauperis

Statistical Cards

Card	Date Mailed
JS-5	May 5, 1975
JS-6	

United States District Court Docket DC-111 (Rev. 1/75)

Civ. 75-104, Griffin, Inc. vs. James H. Tully, Jr., et al

DATE 1975	NR.	Proceedings
Apr. 22	1	Filed Complaint.
" "		Issued Summons.
May 6	2	Filed Summons and Order for Notice and Proof of Delivery returned served.
May 12	3	Filed Appearance of Louis J. Lefkowitz, Esq. for Defts.
" "	4	Filed Notice of Cross Motion to Dismiss.
" "	5	Filed Memorandum of Law.
May 15	6	Filed Pltf's Request for Extension of Time.
" "		Upon Consideration of request for extension of time to May 30, 1975 to file reply memorandum to defendants' motion to dismiss, in accordance with Rule 6(b) FRCP, it is ORDERED: Motion granted. By Direction of the Court.

Relevant Docket Entries in U.S. District Court
for District of Vermont.

May 30	7	Filed Motion for Preliminary Injunction.
" "	8	Filed Affidavit of Arthur E. Wickenden.
" "	9	Filed Affidavit of Robert J. Dimke.
" "	10	Filed Affidavit of John Lonergan.
" "	11	Filed Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, and in support of Plaintiff's Motion for Preliminary Injunction.
June 13	12	Filed Defts' Memorandum of Law in opposition to Pltf's Motion for a Preliminary Injunction and in Reply to Pltt's Memorandum in Opposition to Defts' Motion to Dismiss.
June 27		In Court before Judge Holden, Paul Wickes, Esq., and Harvey Carter, Esq. for Plaintiff. Peter Joslin, Esq., and Thomas P. Zolezzi, Esq., for Defendants. Hearing on Defendants' notice of cross motion to dismiss.
" "		Statements made to Court by Mr. Zolezzi in support of Defendants' motion to dismiss; objected to by Mr. Wickes for Plaintiff.
" "		Ordered: Motion to dismiss denied without prejudice and motion may be renewed to Three Judge Court, which will be requested to be convened under T. 18 USC Sec. 2284; Case continued to July 11, 1975 at which time parties to have stipulation of agreed facts ready.
July 8	13	Filed Stipulation.
July 14	14	Filed Designation of Judges. Mailed copy to attorneys.
Aug. 1		In Court before Three Judge Court. R. Paul Wickes and James Burger, Esqs.

Relevant Docket Entries in U.S. District Court
for District of Vermont.

		for Pltf.; Thomas P. Zolezzi, Esq. for Defts.
Aug. 1		Hearing on Defts' Motion to Dismiss.
" "		Statements made to Court by Mr. Zolezzi in support of Defts' motion to dismiss; followed by Mr. Wickes in opposition.
" "		Defts. requested to notify three-judge Court by Monday next if Tax Dept. of New York will postpone its assessment of taxes due.
" "		Taken under advisement.
Aug. 6	15	Filed cancellation of NY State Tax assessment and statement of reissue.
Aug. 15	16	Filed letter dated August 14, 1975 from plaintiff's counsel.
Oct. 21	17	Filed Opinion 3 Judge Court---Defendant's Motion to Dismiss is denied. Pltf's Motion for a Preliminary Injuction is hereby granted. Defts. are temporarily enjoined from attempting to collect the tax assessed against Pltf. Defts. are ordered to revoke the notice of assessment dated 8-8-75 and hold further collection proceedings in abeyance pending a determination of this matter on the merits. (Mailed copies to Attny.)
Nov. 10	18	Filed Defts' Notice of Appeal. Mailed copy to Williams, Witten, Carter & Wickes, Esqs., Thomas P. Zolezzi, Esq., Theriault & Joslin, Esqs., Court Reporter, Judges Oakes, Holden & Coffrin & Clerk, U. S. Supreme Court.
" "		Mailed Plan and Forms C & D to Defts' atty.
Dec. 29		Mailed Record on Appeal to Clerk, U. S. Supreme Court, Washington, D.C.

Relevant Docket Entries in U.S. District Court
for District of Vermont.

CIVIL DOCKET CONTINUATION SHEET

Plaintiff	Defendant
Griffin, Inc.	James H. Tully, Jr. et al

Docket No. 75-104
Page ____ of ____ Pages

DATE	NR.	Proceedings
1976 Mar. 1	19	Filed Certified copy of Supreme Court Order noting probable jurisdiction.